Mohamed Selan v PB Securities Sdn Bhd

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO R1-24-38 OF 1991
EUSOFF CHIN J
8 JANUARY 1992

Agency *— Principal suspending agent — Agreement providing that suspension may be effected without giving reasons — Agent suspended — Principal giving reasons for suspension — Whether principal had abandoned right to suspend agent without giving reasons therefor — Effect of abandoning such right*

Agency *— Wrongful suspension — Whether court may order reinstatement of plaintiff as agent*

Contract *— Agency — Construction of terms — Negligence — Indemnity — Remisier engaged by stockbrokers — Stockbrokers suffering loss in transactions involving missing or stolen share certificates — Agreement providing for remisier to indemnify stockbrokers against losses whatsoever and howsoever arising in respect of forged or stolen share certificates — Remisier alleging stockbrokers' negligence caused loss — Whether remisier liable for losses occasioned thereby*

The plaintiff was engaged as a remisier by the defendant stockbrokers pursuant to a written agreement by which the plaintiff had agreed, inter alia, to indemnify and keep indemnified the defendant against all claims, losses and liabilities 'whatsoever and howsoever arising' in respect of any forged or stolen scrips and/or transfers delivered by the plaintiff's client or clients following any transaction concluded by the plaintiff. The defendant agreed, inter alia, to do all things reasonably necessary to enable the plaintiff to earn his commission.

The plaintiff had acted for a client in the sale of certain shares quoted on the Kuala Lumpur Stock Exchange ('KLSE'). It was later discovered that a large number of the share certificates concerned had been reported stolen or missing. The client was paid for the shares on the very day that he had delivered the share certificates and transfer forms to the defendant, in contravention of the rules of the KLSE which provided, inter alia, that payment was to be made on the sixth market day following the date of contract and after delivery of the securities. The defendant was required to buy other shares to replace some of the stolen shares and to deliver them to the buyers. The plaintiff was suspended from trading by the defendant who gave reasons for its decision (although the agreement provided that no reason need be given for suspension) but on appeal he was allowed to continue trading under certain conditions.

The plaintiff sought a declaration that the suspension was null and void and for an order for reinstatement with full facilities as before his suspension. He also sought a declaration that he was under no liability to the defendant for the amount of the accumulated potential loss

incurred. He also sought damages for wrongful suspension and/or loss of income.

The KLSE had issued circulars to its members regarding the missing or stolen share certificates on 14 August 1990. The client was paid on 16 August 1990, the date of delivery of the scrips, when he should have been paid only on 22 August 1990, which was the sixth market day. The plaintiff contended that it was the gross negligence on the part of the defendant which caused the latter to suffer the losses. The defendant contended that the plaintiff had agreed to indemnify it whether or not it had been guilty of negligence.

Held, allowing the plaintiff's application:

(1) The plaintiff had agreed to indemnify the defendant under cl 5(ix) of the agreement but that sub-clause must be read with cl 5(v) which imposes a duty on the defendant to exercise all reasonable diligence to ensure that what needs to be done was done to enable the plaintiff to earn his commission. Reading cl 5(v) and (ix) together, the court was of the view that the indemnity should cover all losses suffered by the defendant in respect of forged or stolen share scrips in cases only where there is no negligence on the part of the defendant.

(2) The defendant had not exercised reasonable diligence in the performance of its duty to enable the plaintiff to earn his commission as agreed to in cl 5(v) of the agreement and to that extent had committed a breach of the agreement. The defendant had also flouted the KLSE rules and had not taken reasonable precautions to prevent the receipt of stolen share scrips from the client. The losses were suffered by the defendant through its own negligence and it should not be allowed to rely on cl 5(ix) of the agreement for indemnity from the plaintiff.

(3) There was no evidence that the plaintiff was negligent in the performance of his duties to the defendant.

(4) Although the defendant had the right under the agreement to suspend the plaintiff without giving any reason whatsoever, it had intentionally or voluntarily abandoned that right when it gave its reasons for suspending the plaintiff. The court is then entitled to examine the reasons given to decide whether the defendant's action was justified under the circumstances. Having found that the defendant had suffered the losses through its own negligence, it is not justified for the defendant to put the blame on the plaintiff and suspend the latter from trading nor was it just to recover its losses by deducting the amount from the plaintiff's security deposit.

(5) The plaintiff was an agent and not an employee of the defendant. It would not be proper for the court to order the defendant to re-employ the plaintiff as its remisier on the principle that a man will not be compelled to employ another against his will. The plaintiff's remedy lay in damages.

[Bahasa Malaysia summary

Plaintif telah diambil sebagai wakil defendan yang merupakan broker saham mengikut satu perjanjian bertulis dalam mana plaintif bersetuju, antara lain, untuk menanggung rugi defendan terhadap segala tuntutan, kerugian dan liabiliti 'whatsoever and howsoever arising' berkenaan dengan sebarang skrip palsu atau curian dan/atau pemindahan yang diserahkan oleh klien plaintif selepas sebarang transaksi yang dilaksanakan oleh plaintif. Defendan bersetuju, antara lain, untuk membuat segala yang semunasabahnya perlu untuk membolehkan plaintif mendapat komisennya.

Plaintif telah bertindak bagi pihak satu klien dalam penjualan syer tertentu yang disenaraikan di Pasaran Saham Kuala Lumpur ('PSKL'). Kemudiannya telah diketahui bahawa sejumlah besar sijil syer berkenaan telah dilaporkan dicuri atau hilang. Klien itu telahpun dibayar bagi syer itu pada hari yang sama apabila dia menyerahkan sijil syer itu dan borang pemindahan kepada defendan, bercanggahan dengan kaedah-kaedah PSKL yang memperuntukkan, antara lain, bahawa pembayaran patut dibuat pada hari pasaran yang keenam selepas tarikh kontrak dan selepas penyerahan sekuriti itu. Defendan terpaksa membeli syer yang lain sebagai ganti beberapa syer yang dicuri itu dan menyerahkan mereka kepada pembeli. Plaintif telah digantung daripada mengurus perniagan oleh defendan yang memberi sebab-sebab bagi keputusan yang diambil (walaupun perjanjian itu mensyaratkan bahawa tiada sebab perlu diberi bagi penggantungan) tetapi atas rayuan dia dibenarkan meneruskan perniagaan di bawah syarat tertentu.

Plaintif memohon satu deklarasi bahawa penggantungan itu adalah terbatal dan tidak sah dan satu perintah menempatkan semula dirinya dengan kemudahan sepenuhnya seperti sebelum dia digantung. Dia juga memohon satu deklarasi bahawa dia tidak di bawah sebarang liabiliti kepada defendan untuk amaun kerugian berpotensi terkumpul yang telah ditanggung. Dia juga memohon ganti rugi kerana penggantungan salah dan/atau kerugian pendapatan.

PSKL telah mengeluarkan pekeliling kepada ahlinya tentang sijil syer berkenaan yang hilang atau dicuri pada 14 Ogos 1990. Klien itu telah dibayar pada 16 Ogos 1990, hari penyerahan skrip itu, sedangkan dia seharusnya dibayar hanya pada 22 Ogos 1990, iaitu hari pasaran keenam. Plaintif berhujah bahawa kecuaian melampau pada bahagian defendan menyebabkan defendan mengalami kerugian itu. Defendan berhujah bahawa plaintif telah bersetuju untuk menanggung ruginya sama ada atau tidak ia bersalah kerana kecuaian.

Diputuskan, membenarkan permohonan plaintif itu.

(1) Plaintif telah bersetuju untuk menanggung rugi defendan di bawah fasal 5(ix) perjanjian itu tetapi fasal kecil itu mesti dibaca bersama dengan fasal 5(v) yang mengenakan kewajipan pada defendan untuk menggunakan segala ketekunan yang munasabah untuk

memastikan apa yang perlu dibuat dijalankan untuk membolehkan plaintif mendapat komisennya. Membaca fasal 5(v) dan (ix) bersama, mahkamah berpendapat bahawa tanggung rugi itu harus meliputi semua kerugian yang dialami oleh defendan berkenaan dengan skrip palsu atau curian dalam kes hanya di mana tidak terdapat apa-apa kecuaian pada bahagian defendan.

(2) Defendan tidak menggunakan ketekunan yang munasabah dalam pelaksanaan kewajipannya untuk membolehkan plaintif mendapat komisennya seperti yang dipersetujui dalam fasal 5(v) perjanjian itu dan setakat itu telah melakukan kemungkiran perjanjian itu. Defendan juga telah melanggar kaedah-kaedah PSKL itu dan tidak mengambil langkah mencegah penerimaan skrip syer yang dicuri daripada klien itu. Kerugian dialami oleh defendan melalui kecuaiannya sendiri dan ia tidak harus dibenarkan bergantung pada fasal 5(ix) perjanjian itu untuk tanggung rugi daripada plaintif.

(3) Tiada keterangan menunjukkan bahawa plaintif cuai dalam pelaksanaan kewajipannya kepada defendan.

(4) Walaupun defendan berhak di bawah perjanjian itu untuk menggantung plaintif tanpa memberi sebarang sebab apa pun, ia telah dengan sengaja atau dengan sukarela membuang hak itu apabila ia memberi sebab-sebab mengapa plaintif digantung. Mahkamah kemudian berhak memeriksa sebab-sebab yang diberi untuk memutuskan sama ada tindakan defendan adalah mempunyai justifikasi dalam keadaan begitu. Setelah didapati bahawa defendan mengalami kerugian melalui kecuaiannya sendiri, tidaklah berjustifikasi untuk defendan meletak tanggungjawab bagi kerugian itu atas plaintif dan menggantung plaintif daripada mengurus perniagaan dan bukanlah adil untuk menebus kerugiannya dengan menolak amaun itu daripada wang cengkeram jaminan plaintif.

(5) Plaintif adalah seorang ejen dan bukan pekerja defendan. Tidaklah betul bagi mahkamah memerintahkan defendan mengambil semula plaintif sebagai wakil atas prinsip bahawa seseorang tidak akan dipaksa mengambil seorang yang lain sebagai pekerjanya bertentangan dengan kemahuannya. Remedi plaintif terletak dalam pemberian ganti rugi.]

[*Editorial Note*: The defendant has appealed to the Supreme Court vide Civil Appeal No 02–39–92.]

Cases referred to

1 *Smith v South Wales Switchgear Ltd* [1978] 1 WLR 165; [1978] 1 All ER 18 (folld)
2 *Lee Kam Wah v Associated Asian Securities (Pte) Ltd* [1991] 3 MLJ 286 (refd)
3 *Fung Keong Rubber Manufacturing (M) Sdn Bhd v Lee Eng Kiat & Ors* [1981] 1 MLJ 238 (folld)
4 *Francis v Municipal Councillors of Kuala Lumpur* [1962] MLJ 407 (folld)

Legislation referred to
Contracts Act 1950 ss 175, 176, 178
Securities Industry Act 1983 s 13

Shamsul Bahrain (*Skrine & Co*) for the plaintiff.
Sumathi Krishnan (*Adnan Sundra & Low*) for the defendant.

Cur Adv Vult

Eusoff Chin J: The plaintiff is licenced by the Registrar of Companies under s 13 of the Securities Industry Act 1983 as a representative of the defendant PB Securities Sdn Bhd. The plaintiff and the defendant signed a remisier's agreement dated 4 January 1988 by which the plaintiff became a remisier of the defendant. The plaintiff as remisier was not an employee of the defendant, but he transacted selling and buying of shares for the defendant, for which the plaintiff was paid commissions by the defendant. The plaintiff, was in fact an agent of the defendant.

The facts and documents tendered through affidavits have been agreed to by the parties. In early August 1990, the plaintiff introduced one Cheong Seng Tatt to open an account with the defendant, and be registered as a client/customer of the defendant. For this purpose, Cheong Seng Tatt filled in an application form addressed to the defendant. After Cheong Seng Tatt's application was approved by a director of the defendant, he became a registered client/customer of the defendant, and he was accepted to trade with the defendant.

Cheong Seng Tatt then gave instructions to the plaintiff to sell —

(i) on 14 August 1990, 14,000 units of shares in MUIB and 10,000 units of shares in UCB;
(ii) on 15 August 1990, 6,000 units of shares in MUIB;
(iii) on 20 August 1990, 12,000 units of shares in MUIB;
(iv) on 22 August 1990, 10,000 units of shares in UCB; and
(v) on 23 August 1990, 13,000 units of shares in UCB.

Following these sales made through the defendant, the defendant issued contract notes to Cheong Seng Tatt duly executed by the directors of the defendant.

By way of an announcement, the Kuala Lumpur Stock Exchange ('KLSE') formulated regulations to replace their existing delivery and settlement system with a new system called fixed delivery and settlement system, which came into force on Monday, 12 February 1990. Under this new system, the customer Cheong Seng Tatt, must physically submit the certificates of the shares to be sold (the scrips) together with transfer forms, direct to the receiving counter at the defendant's office by the fourth market day following the date of contract. This system is popularly known as 'T + 4'.

Following this T + 4 system, Cheong Seng Tatt submitted the share certificates of the shares sold by him and the necessary transfer forms direct to the defendant's receiving counter within the stipulated time. Further

under this new system of the KLSE, Cheong Seng Tatt, as a customer who sold the shares, must be paid on the sixth market day following the date of contract. This system is popularly known as 'T + 6'.

The defendant as a dealer in securities and a member of the KLSE has to comply with the regulations made by the KLSE in conducting its business.

It is not disputed that the KLSE from time to time issue circulars called members' circulars to its members informing them of reported missing, stolen or lost share certificates. By such circulars the KLSE gives the particulars of a lost certificate such as the certificate number, the name of the company, the name of the person who owns the shares, and the amount of units stated in the lost/missing share certificate. The purpose of the circulars is to warn members of the KLSE not to deal in such lost/missing certificates if presented to them.

It is admitted by learned counsel for the defendant that like most dealers in securities, the defendant too use computers in their office. When such a circular is received from the KLSE the particulars of the reported lost share certificates would be keyed into their computers.

It was found that a large number of share certificates delivered to the defendant by Cheong Seng Tatt had been reported stolen or missing. In respect of some of the stolen share certificates, members' circulars had been issued by the KLSE before Cheong Seng Tatt delivered the share certificates to the defendant's receiving counter, and others were contained in members' circulars issued after Cheong Seng Tatt delivered the share certificates. But one thing is clear, and that is, the defendant had paid Cheong Seng Tatt for the shares sold by him on the very day when Cheong Seng Tatt delivered the share certificates accompanied by the appropriate transfer forms.

As a result of this, the defendant could not deliver the share certificates to the buyers. Cheong Seng Tatt bought a few shares to replace the stolen shares, and the defendant had to buy other shares in the market to replace the stolen shares for deliveries to the buyers. The defendant thereby incurred losses of $54,975.45.

Under the remisier's agreement, the plaintiff had placed a deposit of $100,000 with the defendant. However on 1 December 1990, the plaintiff's deposit with the defendant was $37,423.13 only. The defendant alleged that it suffered losses due to the plaintiff's fault, for having introduced Cheong Seng Tatt to the defendant. The defendant took the plaintiff's deposit to pay its losses and further asked the plaintiff for the balance of $17,552.32 ($54,975.45 – $37,423.13).

The defendant by its letter dated 20 December 1990 suspended the plaintiff from trading with immediate effect, but on appeal, the plaintiff was allowed with effect from 24 December 1990 to continue trading but only on the following conditions —

(i) that the plaintiff was allowed to deal with purchasing customers only;
(ii) that the purchasing customers must deposit 20% cash or security;
(iii) that the plaintiff must build up his deposit to $100,000.

The plaintiff had no choice as the licence issued to him by the Registrar of Companies under s 13 of the Securities Industry Act 1983, restricted him to be a representative of the defendant only. Trading under such restrictions, the plaintiff managed to accumulate $9,570.01 as commissions due to him from the defendant, which the defendant withheld.

The plaintiff filed a writ in the civil division of the High Court against the defendant vide C/S D5-22-910-1991 and on the same day filed another claim in the appeals and miscellaneous division of the High Court (this case). He withdrew the claim in the civil division and proceeded with this claim. By his originating summons (as amended) the plaintiff prays for —

(1) A declaration that the suspension of the plaintiff on 20 December 1990 as remisier in PB Securities Sdn Bhd (the defendant) be annulled and the plaintiff be reinstated forthwith *with full facilities — the same as before his suspension.*
(2) A declaration that the plaintiff is under no liability to the defendant to the amount of the accumulated potential loss incurred as a result of buying 22,000 MUIB shares valued at $41,350.34 and 16,000 UCB shares valued at $38,241 and interest till 30 May 1991 amounting to $3,006.96 and still continuing and a further 13,000 UCB shares value which is yet to be ascertained.
(3) That the security deposit of the plaintiff amounting to $42,406.01 as at 31 May 1991 be not frozen and that it will not in any way be debited with any loss, expenses, liabilities and interest charges connected with the account of client, Cheong Seng Tatt.
(4) Damages for wrongful suspension and/or loss of income through brokerage commission from 20 December 1990 till the date of annulment of the suspension at $6,435.36 per month and interest at 6.5% of the build-up account.
(5) Further and other relief which this Honourable Court deems fit;
(6) Costs.

The relevant parts of the regulations made by the KLSE effective from 12 February 1990 through its announcement issued to all its members are —

Delivery for contract done on ready basis:

1 All contracts done on ready basis on a particular market day shall be due for delivery:

(a) not later than the fourth (4th) market day, latest by 12.30pm following the date of contract in respect of selling clients to member companies.

Settlement for contracts done on ready basis:

2 Payment for contracts done on ready basis shall be effected:

(a) on the sixth (6th) market day following the date of contract, latest by 4pm in respect of member companies to selling clients, subject to reg 5 below.

5 Payment to selling clients shall be after delivery of securities such as constitute good delivery.

The defendant produced a record of its dealings with Cheong Seng Tatt as exh 'WKP2' which shows that on 14 August 1990 Cheong Seng Tatt sold

10,000 units of UCB shares, contained in ten UCB share certificates. Two days later on 16 August 1990 Cheong Seng Tatt went to the defendant's receiving counter and delivered the ten UCB share certificates. The defendant's officers at this counter accepted the certificates, and paid Cheong Seng Tatt by cheque No 071148 dated 16 August 1990. Of the ten share certificates, six share certificates were dealt with under one Contract No S75952. One of these six share certificates No 80305923 in the name of Lee Chui Lan had been reported stolen vide KLSE Members' Circular No SC1454 issued on 14 August 1990.

On that same day, 14 August 1990 Cheong Seng Tatt sold 14,000 units of MUI shares contained in 19 share certificates. He delivered the 19 certificates on 16 August 1990. In respect of Contract No S75943 alone, he delivered six MUI share certificates, one of which ie No 003161–3 in the name of Yeo Eng Joo was reported stolen vide KLSE Members' Circular No SC1455 issued on 14 August 1990. But when on 16 August 1990, these certificates were delivered by Cheong Seng Tatt at the defendant's receiving counter, the defendant's officers accepted all the certificates and paid Cheong Seng Tatt on the date of delivery of the certificates itself, ie 16 August 1990 vide the same cheque No 071148.

It is to be noted that the defendant had failed to follow the regulations issued by KLSE in that the defendant did not comply with the T + 6 system when making payment/settlement to Cheong Seng Tatt. If the T + 6 system was followed, payment could only be made on the sixth market day following the date of contract. Since 18 and 19 August 1990 were a Saturday and a Sunday respectively (not market days) the sixth market day would fall on 22 August 1990 and not 16 August 1990. The members' circulars in respect of the two missing or stolen share certificates were issued by KLSE on 14 August 1990. The evidence of Encik Mohd Salleh bin Abd Majid, the general manager of KLSE, shows that each of the KLSE members sent his/its officers daily to the KLSE to either deliver or collect share scrips and in the course of doing so these officers would also collect letters or circulars from KLSE to its members. Each of the members of KLSE is provided with dockets or pigeonholes in which these letters or circulars are placed for collection by its members. Since the circulars were placed in the defendant's pigeonhole at the KLSE, they would have been collected by the defendant's officers on the same day. But assuming that these circulars were posted by ordinary course of posting, the circulars would have reached the defendant by the next day, since the KLSE and the defendant are both in Kuala Lumpur. Even if there was a delay in the post, the circulars would certainly have been in the defendant's possession before 22 August 1990 (the sixth market day). Since the defendant's company was computerized, the information on the lost or missing certificates could have been easily checked by the officers of the defendant manning the scrip receiving counters. Of course if these information were not keyed into the defendant's computers, the plaintiff cannot be the person responsible for not doing that.

The plaintiff said it is the gross negligence on the part of the defendant that caused the defendant to suffer the losses. The defendant, on the other hand, said that whether the defendant was guilty of negligence or not, the plaintiff had agreed to indemnify the defendant as the remisier's agreement

had contained cl 5 to that effect. The relevant parts of cl 5 are worded as follows:

The remisier shall:

(i) exercise all reasonable care and skill in the performance of his duties and shall act faithfully on behalf of the company. The company will do all things reasonably necessary to enable the remisier to earn his due commission.

(ix) indemnify and keep indemnified the company against all claims, losses and liabilities whatsoever and howsoever arising in respect of any forged or stolen scrips and/or transfers delivered by the remisier's client or clients following any transaction concluded by the remisier previously, currently or in future.

In the course of arguments Cik Krishnan, the learned counsel for the defendant relied on cl 5(ix) of the remisier's agreement which is, that the plaintiff must indemnify the defendant for all losses suffered by the defendant. With respect, I think this clause must be read subject to cl 5(i) of the remisier's agreement, in particular, that part which states: 'The company will do all things reasonably necessary to enable the remisier to earn his due commission.' Because of the ruling of the KLSE that when shares were sold, share certificates had to be delivered directly to the defendant's receiving counter, and not to the remisier, the remisier, in this case, had no opportunity to see or examine the certificates. Even if the remisier had the opportunity to examine those share certificates, he would have no means of ascertaining if those certificates were genuine or not because there is no evidence that KLSE members' circulars on missing, stolen or lost certificates were sent or extended to remisiers.

Had the defendant done 'all things reasonably necessary to enable the remisier (the plaintiff) to earn his due commission'? I think the defendant had not done so. I find the losses suffered by the defendant arose out of its own negligence in that either:

(i) the defendant did not key into its computer the certificates reported stolen or missing; or

(ii) if the information was keyed into its computer, the defendant's officers at the scrip receiving counter did not check the information when receiving the share certificates from Cheong Seng Tatt;

(iii) the defendant did not wait for the sixth market day to make payment to Cheong Seng Tatt; and

(iv) the defendant should have checked its computers before making the payment to Cheong Seng Tatt to ensure that the share certificates delivered by Cheong Seng Tatt were all genuine.

Had the defendant not been negligent and had the defendant done what is reasonably necessary in the circumstances, the defendant would have discovered on its first dealing with Cheong Seng Tatt that Cheong Seng Tatt was in fact dealing in stolen shares, and thereafter the defendant should have stopped from further dealing with him. The evidence shows that in his subsequent dealings with the defendant, Cheong Seng Tatt had delivered more stolen share certificates to the defendant's scrip receiving counters,

and that he was paid by the defendant on the dates of delivery of the share certificates instead of on the sixth market day.

Coming back to cl 5(ix) of the remisier's agreement, it was held in *Smith v South Wales Switchgear Ltd*[1] that a clause in the form 'shall indemnify ... against any liability loss, claim or proceeding whatsoever' may be insufficient to include negligence since the word 'whatsoever' may, in the context of the agreement, be no more than a word of emphasis, and not equivalent to an express reference to negligence. If there was no express reference to negligence, the indemnity would be ineffective to cover negligence.

In law the term 'indemnity' is used in several different senses. In its widest sense it means recompense for any loss or liability which one person has incurred, whether the duty to indemnify comes from an agreement or not. Under the Contracts Act 1950, ss 175, 176, and 178 state:

Agent to be indemnified against consequences of lawful acts.	175 The employer of an agent is bound to indemnify him against the consequences of all lawful acts done by the agent in exercise of the authority conferred upon him.
Agent to be indemnified against consequences of acts done in good faith.	176 Where one person employs another to do an act, and the agent does the act in good faith, the employer is liable to indemnify the agent against the consequences of that act, though it cause an injury to the rights of third persons.
Compensation to agent for injury a caused by principal's neglect.	178 The principal must make compensation to his agent in respect of injury caused to the agent by the principal's neglect or want of skill.

However, in the case here, under cl 5(ix) of the remisier's agreement, the plaintiff, as remisier, had agreed to indemnify the defendant. But this cl 5(ix) must not be read in isolation. It has to be read with cl 5(v) which imposes a duty on the defendant to exercise all reasonable deligence to ensure that what needs to be done, was done to enable the plaintiff to earn his commission. Reading sub-cll (v) and (ix) of cl 5 of the remisier's agreement, I am of the view that the indemnity in cl 5(ix) should not be applied in its widest sense to include all losses suffered by the defendant in respect of forged or stolen share scrips howsoever arising, but that the indemnity should only cover all losses suffered by the defendant in respect of forged or stolen share scrips in cases only where the defendant had, as agreed, exercised due diligence in the performance of its duty to ensure that the plaintiff gets his commission. In other words, the indemnity in cl 5(ix) should only be applied to cases where there is no negligence on the part of the defendant. That, I think, must have been intended by the parties. To give the 'indemnity' cl 5(ix) its widest sense would only be possible if I were to ignore the defendant's part of the agreement contained in cl 5(v) of the remisier's agreement.

Looking at the remisier's agreement, in particular cl 5(v), and the evidence before the court, I find there has been no instruction given by the defendant to the plaintiff to the effect that the plaintiff must call for, check and examine share certificates from those wanting to sell shares. Clause 5(v) of the remisier's agreement states —

> [The remisier shall] at all times observe and conform to all laws and customs of or affecting the company's business and fulfil and obey all directives and orders of the company from time to time and not at any time absent himself from the office without the company's prior consent.

What the plaintiff had done here was to comply with the rules of the KLSE, ie that which requires the seller Cheong Seng Tatt to deliver the share certificates directly to the defendant's share receiving counter. There was also no evidence to show: (i) that the plaintiff was aware that Cheong Seng Tatt would be dealing in stolen share certificates, or (ii) that the plaintiff and Cheong Seng Tatt had collaborated to cheat the defendant. As it is, the evidence of the plaintiff is that he had not even got the opportunity to lay sight of the share certificates because they were delivered directly to the defendant's receiving counters. I can find no evidence which shows that the plaintiff was negligent in the performance of his duties to the defendant. The defendant said that the plaintiff was responsible for the loss because the plaintiff had recommended Cheong Seng Tatt to be a client. This cannot be so, because Cheong Seng Tatt was required by the defendant to fill an application form giving all the details and particulars of himself, his business etc, before the defendant approved his application to be the defendant's client. The defendant had the right to reject Cheong Seng Tatt as a client, and if the defendant had done that, there was nothing that the plaintiff could do to compel the defendant to accept Cheong Seng Tatt as a client. It cannot, therefore, be said that the plaintiff had not exercised all reasonable care and skill in the performance of his duties as a remisier of the defendant or that he had not followed any directive given by the defendant.

On the other hand, I find that it is the defendant which, having agreed 'to do all things reasonably necessary to enable the remisier (the plaintiff) to earn his due commission', had breached its agreement with the plaintiff by taking an easy, relaxed and couldn't care less attitude when dealing with Cheong Seng Tatt, all the time feeling assured that should any stolen share certificate be delivered to the defendant which resulted in the defendant's suffering any loss, the defendant could always deduct the amount lost, from the plaintiff's $100,000 deposit. Circulars after circulars were issued by KLSE to its members (including the defendant) on missing, lost or stolen share certificates, the purpose of which was to alert KLSE members to be on the lookout and be on guard against these stolen or lost certificates being delivered to them. The defendant, therefore, must exercise reasonable diligence, particularly its officers manning its scrip receiving counters, to ensure that lost or stolen share certificates were not delivered to it. All the defendant could say was that they had not received the KLSE members' circulars. But the evidence shows that it is the duty of the defendant or its officers who daily went to the KLSE to deliver scrips, or letters, to collect from KLSE letters or circulars put in the members' respective pigeonholes, and if the circulars were not collected by the defendant's officers or if collected the particulars were not keyed into its computers, it is certainly the fault of the defendant if the defendant's officers accepted stolen share certificates.

In conclusion, I find that the defendant had not exercised reasonable deligence in the performance of its duty to enable the plaintiff to earn his

commission as agreed to in cl 5(v) of the remisier's agreement, and to that extent, the defendant had committed a breach of the remisier's agreement. I also find that the defendant had flouted the KLSE T + 6 rules and being aware of the possibility of stolen share certificates being delivered to its scrip receiving counter, had not taken reasonable precautions to prevent such happenings. I also find that the losses suffered by the defendant were through its own negligence, and the defendant should not be allowed to rely on the indemnity cl 5(ix) of the remisier's agreement.

In *Lee Kam Wah v Associated Asian Securities (Pte) Ltd,*[2] the plaintiff Lee Kam Wah was a remisier with the defendants. At the time when Lee Kam Wah commenced the action, the defendants were members of the Stock Exchange of Singapore but had since been put into liquidation. The plaintiff, on ceasing to be a remisier with the defendants, had claimed sums of money from the defendants. The defendants accepted these but counterclaimed for losses suffered by them through the sale of certain public listed company shares which the plaintiff, as a remisier, had put through for one TYK against which TYK had delivered scrips which turned out to be fictitious or forgeries. The basis of the defendants' counterclaim was an agreement setting out the terms and condition of the plaintiff's services as a remisier with the defendants. Under cl 1(viii) of that agreement the plaintiff agreed to be responsible for all liabilities arising from contracts written by him. Under cl 3(iv), the plaintiff agreed to indemnify the defendants of any loss and damages that may arise on all contracts written by him. In Singapore, a remisier was licensed by the Stock Exchange of Singapore, and (as in Malaysia) has to trade through a member of the Stock Exchange. Under the Stock Exchange Rules of Singapore the remisier is an agent of the member firm. In that case too, TYK the seller, had delivered the scrips direct to the defendants' scrip delivery department. Because the scrips were forged, the defendants had to buy genuine scrips to replace the forged shares, and incurred losses of $143,207.74. The Singapore court refused to give judgment on the defendants' counterclaim because there was no evidence that the plaintiff had been negligent in dealing with TYK or that the plaintiff had been a party to TYK's fraudulent transaction.

For the reasons given, I would allow prayers (2) and (3) of the plaintiff's application.

As regards prayers (1) and (4) of the plaintiff's application, Cik Krishnan for the defendant had submitted that based on the evidence and documentary exhibits, the plaintiff was an independent contractor and not an employee of the defendant. Therefore, the question of reinstatement does not arise. Encik Shamsul Bahrain for the plaintiff argued that this is a peculiar case because the licence issued by the Registrar of Companies under s 13 of the Securities Industry Act 1983, authorized the plaintiff to be a representative of the defendant only and therefore the plaintiff cannot find employment from any other stockbroking firm. I agree with Cik Krishnan that the plaintiff is not an employee of the defendant, but the remisier's agreement clearly shows that the plaintiff, as the defendant's remisier and representative, was an agent of the defendant, authorized by the defendant to transact business of buying and selling of shares for the defendant. Even if the plaintiff was an employee or workman of the defendant, at common

law it is not possible for a wrongfully dismissed workman to obtain an order for reinstatement because the common law knew only one remedy, namely, an award for damages. Further, the courts will not normally order reinstatement of a workman who has been wrongfully dismissed by granting a declaration that his dismissal was invalid except under special circumstances — *Fung Keong Rubber Manufacturing (M) Sdn Bhd v Lee Eng Kiat & Ors.*[3] The House of Lords held similar views in the case of *Francis v Municipal Councillors of Kuala Lumpur.*[4]

Cik Krishnan said that in suspending the plaintiff as the defendant's remisier, the defendant relied on cl 4 of the remisier's agreement which states —

> It is hereby agreed that the company may in its absolute discretion limit the volume of transactions of the remisier or to restrict in any manner, the remisier's trading whenever it deems fit to do so or to suspend the remisier from trading at any time at its absolute discretion without assigning any reason whatsoever and to reinstate the remisier with conditions as the company deems fit.

On 20 December 1990 the defendant wrote to the plaintiff to suspend the plaintiff 'from trading with immediate effect'. In that letter, the defendant gave reasons for suspending the plaintiff from trading. The defendant said that as on 1 December 1990 the security deposit of the plaintiff was $37,423.13, and that the losses suffered by the defendant arising from 'the sales of stolen scrips by Cheong Seng Tatt' was $69,135.45. The defendant asked the plaintiff to 'make good the potential loss of $69,135.45'.

It is, therefore, clear that the defendant, knowing and being fully aware of its rights under cl 4 of the remisier's agreement to suspend the plaintiff 'without assigning any reason whatsoever', intentionally or voluntarily abandoned that right when it gave its reasons for suspending the plaintiff. In other words, the defendant had waived its rights not to give reasons for suspending the plaintiff from trading.

Now that the defendant had chosen to give its reasons for suspending the plaintiff, the court is entitled to examine the reasons given, and to decide whether on the reasons given, the defendant's action to suspend the plaintiff from trading was justified under the circumstances. I have already made my findings that on the facts, the defendant had suffered the losses through its own negligence, and because of that it is not justified for the defendant to put the blame on the plaintiff, and to suspend him immediately from trading. Further, the defendant had no just cause to recover its losses suffered through its own negligence by deducting the amount of the losses from the security deposit of the plaintiff. Although the plaintiff had been wrongfully suspended by the defendant from trading, it will not be proper for this court to order the defendant to re-employ the plaintiff as its remisier on the principle that one man will not be compelled to employ another against his will. The plaintiff's remedy lies in damages.

I therefore make the further order that a date be fixed by the senior assistant registrar for assessment of damages, if any, suffered by the plaintiff.

Application allowed.

Reported by PS Ranjan